HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting)
Chapter VIII, Rule 32(2) (b)

Description of the case.

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No. 442 OF 2001

Nazir Ahmad .....Appellant

Versus

State of Uttaranchal .....Respondent

Criminal Appeal No. 443 of 2001
2573 of 1982 (Old No.)

Shamshuddin & others .....Appellants

Versus

State of Uttaranchal .....Respondent

Approved for reporting.

Not approved for reporting.

Date of decision 3rd December 2004.

Initial of Judge. _____

_____

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No. 442 of 2001
2574 of 1982 (Old No.)

Nazir Ahmad s/o Shri Ghulam Ahamad
R/o Village Muhawa Khuaganj,
Police Station Kashipur,
District Nainital ..... Appellants

Versus

State of Uttaranchal ..... Respondent

With

Criminal Appeal No. 443 of 2001
2573 of 1982 (Old No)

Shamshuddin s/o Rahmatullah
and others ..... Appellants

Versus

State of Uttaranchal ..... Respondent

Coram: **Hon. P.C. Verma, J.**
Hon. B. C. Kandpal, J.

Dated: December 3, 2004

Mr. Dharamveer Sharama, learned Senior counsel for the appellants
Mr. G.S. Sandhu assisted by Mr. Nandan Arya, learned A.G.A. for the State.

[Per Hon. B.C. Kandpal, J.]

1. Both the aforesaid criminal appeals arise out of the common facts and evidence and, therefore, they are being disposed of together by this judgment. Criminal Appeal No. 442 of 2001 shall be the leading case. Since accused-appellant Gulam Ahmad, original accused no.2 died during the pendency of the appeal, therefore, criminal

appeal no. 443 of 2001 shall be treated only by appellant Shamshuddin and appellant Srimati Habiban.

2. All the accused persons are of the same family. Gulam Ahmad accused is the father of accused Nazir Ahmad. Smt. Habiban accused is the wife of Shamshuddin and accused Shamshuddin is the brother-in-law (Sala) of Gulam Ahmad accused.

3. Accused persons, injured Mubarak Hussain and deceased Illias are neighbourers and belong to the same village, namely, Mahuakhera Ganj, P.S. Kashipur; and the way leading to the house of the complainant Mohd. Nabi and injured Mubarak Hussain, father of the deceased Illias, was in front of the house of the accused. Accused persons used to throw water on the way as a result of which, way used to become muddy. On 11.01.1981 at about 12 noon, Illias (deceased), nephew of the complainant who was carrying wheat bag to the floor-mill, told accused Shamshuddin as to why they make the way muddy. On this, accused Shamshuddin, Gulam Ahmad, Nazir Ahmad came there and said that he (deceased) be caught and killed. They caught him. Deceased Illias raised alarm. Hearing this, the father of the deceased Illias, namely, Mubarik Hussain, Chand Hussian, Abdul Latif and Chhunu rushed for his rescue, but before they could save him, accused Nazir Ahmad attacked him with a *'Gainti'* and hit a blow on his head. Accused Shamshuddin also started pelting bricks from the roof, and one of the bricks also hit the Mubarik Hussain, father of the deceased. As a result of *Gainti blow,* the deceased fell down and died at the spot. After the incident, the accused persons ran away leaving the 'Gainti' at the spot.

4. The First Information report of the incident was lodged against the accused persons on 11.01.1981 by the uncle of the deceased at Police Station, Kashipur.

5. The Investigation of the case was entrusted to Sri Guljar Singh, S.S.I. posted at P.S. Kashipur. He started investigation on 11.01.1981. On the same day, he reached to the place of occurrence and recorded the statement of witnesses, namely Mohd. Navi, Mubarak Hussain, Chand Hussain, Abdul Latif Jaswant Singh and Abdulla. He inspected the spot and prepared the site plan Ex.Ka.12. On the same day, he arrested the accused Smt. Habiban and accused Gulam Ahmad. On 12.1.1981, he recorded the statement of S.I. G.R. Sagar and Head Constable Ramesh Chandra. Const. Ramesh Chandra Misra P.W.11 is the scribe of the F.I.R. and Sub Inspector G.R. Sagar, P.W.8 conducted inquest proceedings and prepared inquest report. At the same time, he also prepared Photo-Lash Ex. Ka.5. He sealed the dead body and prepared challan Lash Ex. Ka.6. A letter was also sent to Medical Officer Incharge, Dashipr for post mortem. The dead body was sent through const. Charan Singh and Afjal Hussain. He also collected plain earth and blood-stained earth, sealed the same and prepared memo Ex. Ka. 9. He also collected piece of brick & 'Gaiti' in his possession and prepared memo Ex.Ka. 10 and Ex. Ka. 11 respectively. On 13.01.1981, he arrested accused Nazir Ahmad and sent the case property for chemical examination to Agra. After completing the investigation, the Investigating Officer submitted charge – sheet (Ex. Ka. 13) against the accused persons.

6. All the accused persons pleaded false implication, and claimed to be tired.

7. The then Additional Munsif-Magistrate, Kashipur committed the accused persons to stand their trial in the Court of Sessions. After committal of the case, the learned Sessions Judge, framed the charges against the accused Nazir Ahmad under section 302 I.P.C. and 323/34 I.P.C.; against Smt. Habiban under section 302/34 I.P.C. and 323 I.P.C.; and against Shamshuddin and Gulam Ahmed under sections 302/34 I.P.C. and 323/34 I.P.C.

8. The prosecution in proof of its case examined 12 witnesses. P.W.1 Dr. S.P. Gupta had medically examined Mubaraq Hussain and P.W.2 Dr. J.C. Arora conducted autopsy on the dead body of deceased Illias.

9. P.W.1 Dr. S.K. Gupta, Medical Officer, L.D.Bhatt Hospital, Kashipur has deposed that on 11,.01.1981 at 11.230 p.m. he had medically examined Mubaraq Hussain and vide injury report Ex. Ka.1, he had found the following injury on his persons:

> "Medicated lacerated wound 3 cm. X 1 cm. X skull deep on right side of head, 9 cm. above the right ear. Medicated powder was filled in the wound."

10. P.W.2 Dr. J.C. Aroar, Medial Officer, L.D. Bhatt Hospital, Kasipur has deposed that on 12.1.1981 at 11 a.m. he had conducted the post-mortem examination of the dead body of Illias and vide post-mortem report, Ex. Ka-2 had found the following ante-mortem injuries on the same:-

1. Lacerated sound 3 cm. x 1.75 cm. x brain cavity deep, brain matter coming out from the wound on left temporal region, 1 cm. above the left ear.
2. Abrasion 2.5 cm. x 1 cm. on back of left elbow.

3. Abrasion 2cm. x 1cm. on back of right foresarm upper one third.

11. According to the said doctor, deceased Illias had died about one day ago and, therefore, his death would have occurred on 11-01-1981 at about 12 in the noon. The said doctor has also deposed that the death of Illias had occurred on account of the aforesaid brain injury, which was sufficient to cause death in the ordinary course of nature.

12. P.W.3 Mohd. Nabi is the informant. He has deposed that immediately after the occurrence he had rushed to the place of occurrence where he was told the aforesaid incident. He saw that Illias Hussain S/o Mubarak Hussain was lying dead at the spot. Blood stained *Gaiti* (Ex.4) was also lying there. Chand Hussain, Abdul Latif and Chhunu were present at the spot. On inquiry, he was told that by Chand Hussain, Mubarak Hussain, etc. that deceased asked accused Shamshuddin and Gulam Ahmad not to make the way muddy. On this they become annoyed and grappled with him. Accused Nazir Ahmad gave a *Gainti* blow on the deceased and he died at the spot.

13. P.W.4 is Mubaraq Hussain injured. He deposed that deceased was his son. He was carrying wheat bags to his floor-mill. He told the accused persons not to make the way muddy. On this they became annoyed and grappled with him. He raised alarm. The witnesses and others rushed for his rescue, but before they could save him, accused Nazir Ahmad gave a blow on his head and killed him. He also deposed that accused Habiban hit bricks from the roof. One of the stones hit him and he also got injured.

14. P.W.5 Chand Hussain and P.W.6 Abdul Latif are eye witnesses. They supported the prosecution case and narrated the incident as told by P.W.4.

15. Formal Affidavits of Constable no. 551 Charan Singh(P.W.7), who took the dead body for post-mortem and Const. C.P.No. 462 Charan Singh (P.W.12), who took the case property to the Chemical Examiner, have been produced. The blood stained earth, Gainti and brick were taken in possession by the police from the place of occurrence in presence of Abdullah P.W.9. He is also witness of Panchayatnama. P.W.11 Ramesh Chandra Misra was Head Mioharir at P.S. Kashipur, He has deposed that on 11.1.1981 at 1 p.m. Mohd. Nabi had come to him to lodge the report of the incident. He has also deposed that the property of this case, duly sealed was deposited at Police Station on 11.01.1981 by S.I. G.R. Sagar, P.W.8 S.I. Ganesh Rai Sagar had accompanied the Investigation Officer to the place of occurrence and prepared Panchayatnama of the dead body of deceased, photo-lash, etc. the investigation of this case was conducted by P.W. 10 S.I. Gulzar Singh. He recorded the statement of witnesses and arrested the accused persons, and finally submitted charge-sheet against them.

16. Prosecution also tendered in evidence the report of the Chemical Examiner, which shows that the blood was found on the clothes of the deceased and *Gainti,* and the report of the Serologist, which shows that the blood on the cloths of the deceased was human blood. Blood in the earth and *Gainti* was found disintegrated by the Serologist.

17. The defence also examined D.W.1 Dr. Bhanu Prakash Arya, who was medical officer Incharge of Govt. Ayurvedic Chikitshalaya, Mahuwakhera Ganj, where the incident took place. He deposed that he was on leave on 11.01.1981 and therefore, D.W.2 Vishwamitra Sharma, Cmpounder was Incharge of the dispensary on that day. D.W.2 Vishwamitra Sharma has deposed that on 11.01.1981, four persons had brought Mohd. Illias in unconscious conditions, who expired in his dispensary at 12.30 p.m. on the same day. D.W.3 Head Constable Parma Nand was examined to prove report Ex. Kha.2, which was lodged by Gulam Ahmad accused against Mohd. Nabi, informant and three others.

18. After examining the prosecution witnesses and going through the oral and documentary evidence, the learned Sessions Judge convicted and sentenced the appellants vide his judgment and order dated 25.09.1982 in S.T. No. 96 of 1981 State Vs. Nazir Ahmad and others, whereby he has convicted accused-appellant Nazir Ahmad for committing the offence punishable under section 302 I.P.C; accused-appellant Shamshuddin and Gulam Ahmad for the offence punishable under section 302 I.P.C read with section 34 I.P.C. and Smt. Habiban for the offence punishable under section 323 I.P.C., and sentenced accused Nazir Ahmad, Shamshuddin and Gulam Ahmad for life imprisonment. By the same order, he had sentenced Smt. Habiban accused to a fine of Rs. 250/- and in default of payment of fine to undergo life imprisonment for two months under section 323 I.P.C. However, the learned Sessions Judge did not held accused Smt. Habiban guilty of the offence punishable under section 302 I.P.C read with section 34 I.P.C. and accused Nazir Ahmad, Shamshuddin

and Gulam Ahmad of the offence punishable under section 323/34 I.P.C. He accordingly acquitted them under these sections.

19. Aggrieved by the order of the Sessions Judge, both the above criminal appeals have been preferred by the appellants.

20. According to the leaned counsel for the appellants, the conviction of the appellants is against the weight of evidence on record and their conviction is bad in law. He has further submitted that considering the facts and circumstances of the case, the punisment awarded cannot be passed against the appellants.

21. Learned counsel for the State supported the judgment of the lower Court and submitted that the punishment awarded is just and proper in the circumstances of the present case.

22. We have heard learned counsel for the parties and perused the record.

23. First important point to be discussed in this case is the First Information Report which is alleged to have been lodged by Mohd. Nabi (P.W.3). This witness has lodged the First Information Report at P.S. Kahsipur at 1.00 p.m. on the date of the occurrence i.e. on 11.01.1981. The occurrence is alleged to have been taken place at 12:00 noon in village Mahuwakheraganj. The distance of the police station from the place of occurrence is about 7 km. Mohd. Nabi (P.W.3) in his deposition before the court has stated that he was present in his house at the time of the

occurrence and when the came out after hearing hue and cry, he was that Illias S/o Mubaraq Hussain was lying dead before the house of the accused/appellant Shamshuddin. He has also stated that Mubarak Hussaion father of Illias was present at the spot in an injured condition. This witness has also stated that Chand Hussain and Abdul Latif were also present at the spot and when he asked about the real incident then Mubarak Hussain told him that Illias (deceased) asked the accused persons not to throw mud on the way and hearing this accused – Shamshuddin and Gulam Ahmad caught hold Illias and Nazir Ahmed assaulted at Illias with *Gainti*. He has also stated that when Mubarsk Hussain wanted to save Illias then Smt. Habiban pelted stone which hit Mubarak Hussain who also sustained injuries. Therefore, keeping in view the promptness in lodging the First Information Report, the manner of incident cannot be doubted and this possibility is completely ruled out that the information Report, the manner of incident cannot be doubted and this possibility is completely ruled out that the informant had any intention to manipulate the cock and bull story against the accused/appellants.

24. Learned counsel for the appellants has submitted that the ocular version in this case does not inspire confidence as there are material contradictions, omissions and embellishments in their deposition before the court.

25. Perusal of the record shows that Mubarak Hussain (P.W.4) who was injured and alleged to have sustained injuries during the course of the occurrence, Chand Hussain and Abdul Latif both eyewitnesses produced as P.W. 5 and P.W.6, have deposed before the court that Illias was carrying wheat bags to the floor mill and Mubarak Hussain (P.W.4) was helping him. Illisa asked the accused Shamshuddin, Gulam Ahmed and Nazir Ahmed not to throw mud on the way and hearing this accused – Shamshuddin,

Nazir Ahmed and Gulam Ahmed exhorted and Shamshuddin and Gulam Ahmed caught hold the hands of Illias and Nazir Ahmed assaulted on the head of Illias with *Gainti.* Mubarak Hassain has further stated that the accused Smt. Habiban W/o Shamshuddin pelted a brick at Mubarak Hussain who sustained injury on his person.

26. Injured Mubarak Hussain was medically examined by Dr. S.P. Gupta (P.W.1) on 11.01.1981 at 11:20 p.m. who has stated that the injury could have been caused on the person of Mubarak Hussain at any time before his examination and the duration could not be ascertained. The injury on the person of Mubarak Hussain shows that the same was caused at vital part i.e. skull. Therefore, there is no possibility that this injury could have been self-manufactured. Keeping in view the injury on the person of Mubarak Hussain his presence at the spot cannot be doubted. Moreover, the manner of incident pertaining to the injury caused to Illias as has been alleged by this injured witnesses can also not be doubted in view of the injury found on the person of the deceased.

27. The doctor who conducted post mortem examination (Dr. J.C. Arora P.W.2) found lacerated wound, brain cavity deep, brain matter coming out from the wound on left temporal region 1 cm above the left ear. The doctor also found that there was a fractured skull with depression. Bench injuries and the bone pieces were taken out from the skull. The doctor has stated in his deposition that these injuries could have been caused by *Gainti*

28. Again Chand Hussain (P.W.5) and Abdul Latif (P.W.6) produced by the prosecution are the eyewitnesses of

the occurrence. They have also corroborated the statement of Mubarak Hussain (P.W.4). Nothing has come out in the cross-examination of these witnesses which may suggest that these witnesses are telling lie or they were not present at the place of the occurrence when same took place. Hence, their testimony cannot be disbelieved in any manner. The ocular version in this case find full and complete corroboration with the medical version. We are of the definite opinion that the eyewitnesses account clearly establishes that accused/appellant Nazir inflicted a *Gainti* blow on the head of Illias and as a result of which he died.

29. Learned counsel for the defence has referred the evidence of Dr. Bhanu Parkash Arya (E.W.1), Vishwamitra Sharma (D.W.2) compounded as well as Param Nand (D.W.3) head constable.

30. Dr. Bhanu Prakash Arya (E.W.1) has deposed that on the date of the occurrence he was not present in his dispensary as he was the Medical Officer incharge of Rajkiya Ayurvedic Chikitshalaya, Mahuwakheraganj on the date of the occurrence. This witness has stated that as he was on leave on that day being Sunday, hence, Vishwamitra Sharma (compunder) was looking after the work of the said dispensary. Vishwamitra Sharma (D.W.2) has deposed that on 11.01.1981 at 12:00 noon four persons had brought Illias in an unconscious condition before him at that time. He has further deposed that he had done some dressing on the person of Illias but he died on the same day at about 12:30 p.m. in his dispensary. With respect to the same he made an entry in his Out Door Patient register. It is to be observed from the defence evidence that in the aforesaid circumstances compounder never made any entry of any

Injured earlier. The doctor has also admitted this fact that the compounder had no power to register the Medico Legal Cases. Vishwatmitra Sharma (D.W.2) has also admitted the same.

31. On the perusal of the defence evidence it is quite clear that the same is not extending any sort of help to the cases set up by the defence. Secondly, this factor is not much of relevance as to whether Illias – deceased had actually been taken to the dispensary or not, which was situated at a stone throw distance from the place of occurrence. It is to be seen whether an incident of Marpit took place on the date of the occurrence in which Illias lost his life and as we have discussed earlier that the incident of *Marpit* has been established by the prosecution evidence beyond reasonable doubt.

32. We, therefore, come to the conclusion that the genesis of the prosecution is established beyond reasonable doubt and the involvement of the Nazir Ahmad in committing the murder is also established.

33. As far as the case against the accused/appellants Shamshuddin and Smt. Habiban is concerned, the evidence adduced by the prosecution do not inspire confidence. It is the case of the prosecution that Shamshuddin and one Gulam Ahmed assaulted with *Gainti* on the head of the deceased Illias. The manner in which the incident is alleged to have been taken place as per the version of the prosecution, appears to be quite doubtful. It does not appear to be reliable and trustworthy that why two persons would catch hold the hands of the deceased by taking the risk of their own lives. A person who is assaulting with the *Gainti*

at the deceased could have caused the injuries on the person of the assailants who have been attributed the role of catching hold. Therefore, keeping in view the role attributed to the accused/appellant Shamshuddin and another accused Gulam Ahmad, the prosecution story appears to be doubtful as far as the role is attributed to these persons is concerned.

34. Again the role which has been assigned to the appellant Habiban as per the prosecution case that she hurled brick causing injuries on the person of Mubarak Hussain is concerned, against, this part of the prosecution case also does not appear to be trustworthy, as there was no reason available with the accused/appellant Smt. Habiban to involve herself into the crime. It was a quarrel on the path way where the accused /appellant Nazir Ahmad assaulted on the head of Illias who lost his life. Mubarak Hussain was of course, there but there was no reason as to why Smt. Habiban would assault Mubarak Hussaion with a brick causing injury on his person. The injury on the person of Mubarak Hussain could have been caused certainly by the bricks but it could have been caused also by falling over the bricks as per the deposition of doctor. Mubarak Hussain in his deposition has stated that Smt. Habiban hurled so many bricks from her roof but only injury on the head of the injured Mubarak Hussain creates a reasonably doubt as to when he sustained the injury which is alleged to have been caused by Smt. Habiban or he sustained injuries by falling on the earth. The role attributed to Smt. Habiban by the prosecution also appears to be doubtful.

35. Keeping in view the evidence adduced by the prosecution it would be safe to extend the benefit of doubt to the accused persons Shamshuddin and Smt. Habiban as the prosecution could not establish their guilty beyond reasonable doubt.

36. As far as the involvement of the accused/appellant Nazir Ahmed is concerned, it is established beyond reasonable doubt that he assaulted at the head of Illias which resulted in his death.

37. Now, it is to be seen as to whether the appellant Nazir Ahmad has been rightly convicted and sentenced by the learned Sessions Judge under section 302 I.P.C. The evidence of the witnesses produced by the prosecution clearly shows that it was grave and sudden prosecution to the appellant Nazir Ahmad that he inflicted a *Gainti* blow on the deceased when he (deceased) asked the accused persons not to throw mud on the way and thus he committed the offence of murder. Thus, in the light of the prosecution evidence, it could be safely presumed that the appellant Nazir Ahmad had no deliberate intention to cause the death of deceased Illias.

38. Under the aforesaid circumstances, we do not think that the offence under section 302 I.P.C. had been made out against the appellant Nazir Ahmad. Thus, it is difficult to hold that the appellant Nazir committed the murder of deceased Illias. Thus, in our opinion, accused appellant Nazir committed the offence punishable under section 304 part II I.P.C.

39. In view of the aforesaid discussion, we come to the conclusion that the appellants Shamshusdin and Smt. Habiban are liable to be acquitted for the charges leveled against them. We have already extended the benefit of doubt to these appellants.

40. As far as the conviction and sentence passed against the appellant Nazir Ahmad under Section 302 I.P.C. is concerned, we are of the view that the attack by the appellant against the Illias and in view of the fact that the entire incident happened pursuant to a quarrel and that the appellant had no deliberate intention to cause the death of Illias, we do not think that an offence under Section 302 I.P.C. has been made out against the appellant Nazir Ahmed. The incident was a result of sudden quarrel and in that melee the appellant Nazir Ahmed must have use *Gainti* which caused injuries to Illias which ultimately resulted in his death and in this background, it is difficult to hold that the appellant committed the offence of murder. The offence would thus only come under Section 304 Part II of the I.P.C.

41. We, therefore, acquit the appellant Nazir of the offence under Section 302 I.P.C. and find him guilty of offence punishable under Section 304 Part II I.P.C. We accordingly sentence the appellant Nazir Ahmed to 7 years rigorous imprisonment.

42. Criminal Appeal No. 442 of 2001 (new No.) and 2573 of 1982 (old No.) preferred by the appellant Nazir Ahmed therefore, stand partly allowed.

43. Criminal Appeal No. 443 of 2001 (new No.) and 2574 of 1982 preferred by the appellants Shamshuddin and

Smt. Habibin is allowed. They are accordingly acquitted of the charge leveled against them by extending benefit of doubt.

(B.C. Kandpal, J.) **(P.C. Verma, J.)**

DECEMBER 3, 2004
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